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In The
Supreme Court of The United States
October Term 1994

Bobby Hazel and Homer L. Richards
Petitioners,

v.

United States of America
Respondent.

Joint Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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JOINT PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTIONS PRESENTED

1. Whether the United States District Court for the Eastern District of Virginia had subject matter jurisdiction to adjudicate a federal murder case that occurred in the Lorton Reformatory, a penal institution used and managed exclusively by the District of Columbia.

2. Whether the petitioner's Sixth Amendment right to confront witnesses was violated where prejudicial and inadmissible 404(b) evidence was submitted to the jury to explain the bias of a prosecution witness.

3. Whether the District Court and the Court of Appeals improperly denied the petitioner's motion for a new trial.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION ... 14

CONCLUSION 65

TABLE OF AUTHORITIES

CASES

Cannon v. United States, 645 F.2d 1128 (D.C. Cir. 1981) 23, 24

Hackathorn v. Decker, 243 F.Supp. 22 (D.C. Tex. 1965), *affirmed* 369 F.2d 150, *cert. denied* 88 S.Ct. 30, 389 U.S. 940, 19 L.Ed.2d 294. 15

Hamilton v. United States, 409 F.2d 928 (5th Cir. 1969) 11

Huddleston v. United States, 485 US. 685, 108 S.Ct. 1496 (1988) 35

Johnson v. United States, 225 U.S. 405, 56 L.Ed. 1142, 32 S.Ct. 748 (1912) . 24, 25

Larrison v. United States, 24 F.2d 82 (2nd Cir. 1928) 58, 60, 61, 62

Mezarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, L.Ed.2d 1 59

United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1979) 61

United States v. Bilzerian, 926 F.2d 1285 (2nd Cir.), *cert. denied*, 112 S.Ct. 63 (1991) 37, 41

United States v. Briola,
365 F.2d 1018 (10th Cir. 1972) 61

United States v. Chavis,
880 F.2d 788 (4th Cir. 1989) 52, 53, 57

United States v. Curran,
465 F.2d 260 (7th Cir. 1972) 61

United States v. Davis,
960 F.2d 820 (9th Cir. 1972) 63

United States v. Erdos,
474 F.2d 157 (4th Cir. 1973) 27

United States v. Gibson,
880 F.2d 795 (4th Cir. 1989) 23

United States v. Hadaway,
661 F.2d 214 (4th Cir. 1982) 39

United States v. Harman,
349 F.2d 316 (4th Cir. 1965) 42

United States v. Johnson,
487 F.2d 1278 (4th Cir. 1983) 61

United States v. Krasny,
607 F.2d 840 (9th Cir. 1979) 63

United States v. Lewis,
253 F. 469 (S.D.Cal. 1918)) 21

United States v. Meyers,
484 F.2d 113 (3d Cir. 1973) 61

United States v. Rawle,
845 F.2d 1244 (4th Cir. 1988) 35

United States v. Sanders,
964 F.2d 295 (4th Cir. 1992) 42, 44

United States v. Smith,
433 F.2d 149 (5th Cir. 1970) 61

United States v. Stofsky,
527 F.2d 237 (2nd Cir. 1975) 58, 62, 63

United States v. Strowes,
443 F.2d 986 (1st Cir.) *cert. denied*
404 U.S. 851, 92 S. Ct. 87,
30 L.Ed.2d 90 (1971) 61

United States v. Taglia,
922 F.2d 413 (7th Cir. 1991) 58, 60

United States v. Wallace,
528 F.2d 863 (4th Cir. 1976) 58, 60, 61

United States v. Whitworth,
856 F.2d 1268 (9th Cir. 1988) 46

United States v. Young,
916 F.2d 147 (4th Cir. 1990) 12, 16

Young v. Rabideau,
821 F.2d 373 (7th Cir. 1987) 47, 49

CONSTITUTIONS AND STATUTES

U.S. Const. Article III 17

U.S. Const. Amend VI 3

18 United States Code §7(3) ..... passim

18 United States Code §7(5) 19

18 United States Code §9 19

18 United States Code §13 ..... 5, 6, 16

18 United States Code §841 18

18 United States Code §1111 ..... 5, 6, 15

18 United States Code §1791 23

18 United States Code §3231 ..... 4, 6, 18

28 United States Code §1254 2

35 Stat. 688 (60th Cong. 1909) 21

Federal Rules of Criminal Procedure,
Rule 33 ..... 4, 64

Federal Rules of Evidence, Rule 403 41

Federal Rules of Evidence, Rule 404(b) .... passim

D.C. Code §11-502 26

D.C. Code §24-442 23

§53.1-203(4), Code of Virginia
(1950, as amended) 5

MISCELLANEOUS

McCormick on Evidence, §57 (3d ed. 1984) 47

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JOINT PETITION FOR A WRIT OF CERTIORARI

Petitioners, Bobby Hazel and Homer L. Richards, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit (entered August 16, 1994) is included in the Appendix at 1a-7a. The judgment of the United States District Court for the Eastern District of Virginia is included in the Appendix at 9a-33a.

JURISDICTION

The judgment and opinion of the court of appeals were entered on August 16, 1994. The joint petition for certiorari was filed within ninety (90) days of that judgment. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. VI.

18 U.S.C. §7(3) provides, in pertinent parts, that the term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. §3231 provides that:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

Rule 404(b) of the Federal Rules of Criminal Procedure states, in pertinent parts:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent...provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 33 of the Federal Rules of Criminal Procedure states, in pertinent parts:

The court on motion of a defendant may grant a new trial to that defendant if required in the

interest of justice.

STATEMENT OF CASE

On June 16, 1992, someone murdered Gregory Ford, an inmate at the Lorton Reformatory. The Lorton Reformatory is a penal institution located in Fairfax, Virginia, which is used and managed exclusively by the District of Columbia. On February 11, 1993, petitioners Bobby Hazel (hereinafter referred to as Hazel) and Homer L. Richards (hereinafter referred to as Richards) were indicted by a federal grand jury in the Eastern District of Virginia and charged with murder in violation of 18 U.S.C. §1111 and possession of a dangerous weapon in a correctional facility in violation of the federal assimilative statute under 18 U.S.C. §13, assimilating Virginia law §53.1-203(4), Code of Virginia (1950, as amended).

Jurisdiction of the district court was based upon 18 U.S.C. § 3231. Subject matter jurisdiction over the murder charge was based upon 18 U.S.C. §1111 and 18 U.S.C. §7. Subject matter jurisdiction over the unlawful possession of a weapon in a correctional facility was based upon 18 U.S.C. §13. The federal government asserted subject matter jurisdiction on grounds that the murder occurred within the special maritime and territorial jurisdiction of the United States.

During the trial of this case the government did not offer evidence that Lorton Reformatory is located in Fairfax County, Virginia, or that it is situated on lands acquired or reserved for use by the United States. The government, without a proffer of proof, asked the trial court to take judicial notice that the Central Facility of Lorton Reformatory is in

the Eastern District of Virginia and within the special maritime and territorial jurisdiction of the United States. Over objection of the petitioners, the trial court took such notice.

Before the commencement of the trial, the trial court ordered the government to reveal 404(b) evidence. The government responded that the only 404(b) conduct which may be used at trial suggested that the petitioners had a financial motive to kill the victim. The petitioners accepted the government's representations, and the trial commenced. In the government's case in chief, on cross-examination, a government witness admitted he strongly disliked the petitioner Hazel. On redirect examination the government asked the witness why he did not like petitioner Hazel. In response, the witness testified that petitioner Hazel

had sexually assaulted him.

The defense immediately objected and moved for a mistrial. The trial court asked the government why they had asked the witness that question. The government responded that it did not know that their question would prompt that answer.[1] The court sustained the objection, but denied the motion for a mistrial and instructed the jury to disregard the question.

At trial, the government called on a total of thirteen (13) witnesses. Of the thirteen (13) witnesses, only three (3) were present at the time of the murder. The three witnesses were David Basknight, Travis Cameron and Marshall

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1 After trial, petitioner Richards subpoenaed the government witness and proffered his testimony to show that contrary to the government's response, the witness' statement was known and expected. App. 9a

Hollingsworth.

David Basknight could not testify that the petitioners were present at the scene of the murder although Basknight admitted he was present. The government's sole purpose for calling Basknight as a witness was to dispel any notion that Basknight had committed the murder; the government knew there was evidence that Basknight was involved in the murder. For example, evidence showed Basknight was present during the murder; that the murder occurred within three (3) feet of his bed; that the victim fell into Basknight's room; that Basknight was engaged in a heated argument with the victim just before the crime; and that Basknight had a reason to dislike the victim because the victim had attacked Basknight with a metal pipe prior to the murder. More significantly, the

government knew that Basknight failed a lie detector test when he was questioned during the investigation of the murder.[2]

At the conclusion of the case, the jury convicted petitioner Hazel of first degree murder and petitioner Richards of second degree murder. Petitioners timely noted an appeal from their convictions. Subsequently, petitioners filed several motions for a new trial based upon newly discovered evidence obtained from other inmates who came forth after the trial and accused the government's witnesses of being responsible for the murder.

Petitioners presented affidavits stating that David Basknight had admitted to killing the victim;

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2 The result of the lie detector test was not put into evidence at trial.

that Travis Cameron was in possession of a bloody knife; that contrary to the government's evidence at trial, Cameron moved the body; and that Cameron was seen attacking the victim and backing the victim into Basknight's room. The district court concluded that the evidence proffered by the affidavits would probably not result in an acquittal on retrial and denied petitioners' motions for a new trial. Petitioners timely noted their appeal.

In a consolidated appeal to the Fourth Circuit, the petitioners raised, *inter alia*, the following issues:

1. The lack of subject matter jurisdiction by the district court over a killing that occurs on property used and managed by the District of Columbia.

2. The failure of the district court to grant a mistrial after the government elicited the prejudicial and inflammatory allegation of petitioner Hazel's sexual assault of a witness.

3. The failure of the district court to provide petitioners with a new trial based on newly discovered evidence.

The court of appeals rejected petitioners' argument that the district court committed reversible error by failing to grant a mistrial when the government witness testified that petitioner Hazel had sexually assaulted the witness. The court of appeals held that this response was appropriate because counsel for Hazel probed extensively into the witness' bias and thus, the witness was properly allowed to explain the reason for this bias. App. 3a-4a.

The court of appeals also rejected the petitioners' arguments that Lorton Reformatory is not within the special maritime and territorial jurisdiction of the United States. The Fourth Circuit, citing the case of *United States v. Young*,

916 F.2d 147, 150 (4th Cir. 1990), held that since the United States District Court for the Eastern District of Virginia has original jurisdiction over certain crimes committed at Lorton Reformatory, all crimes committed at Lorton fell within the special maritime and territorial jurisdiction of the United States.

Turning to petitioners' arguments for a new trial based on the newly discovered evidence, the court of appeals held that the affidavits were merely cumulative and impeachment evidence. The court of appeals adopted the district court's conclusion that, in retrospect, the case was not close and that even with the added evidence, such evidence would probably not produce a different result in a new trial.

REASONS FOR GRANTING THE PETITION

I. The Federal Court In The Eastern District Of Virginia Does Not Have Subject Matter Jurisdiction To Adjudicate A Murder Case That Occurred At The Lorton Reformatory.

Prior to this case, petitioners Hazel and Richards were inmates at the Lorton Reformatory. Both were serving sentences imposed by the District of Columbia for crimes that they committed in the District of Columbia. The Lorton Reformatory (hereinafter referred to as Lorton) is a penal institution used and managed exclusively by the District of Columbia. It is, however, located in Northern Virginia.

The petitioners acknowledge that the federal court in the Eastern District of Virginia has original jurisdiction to adjudicate violations of federal law that occurs at Lorton because the prison is located in

Virginia. The petitioners contend that because Lorton is used and managed exclusively by the District of Columbia, Lorton is not a federal enclave and thus, murder at Lorton, although it is a violation of state law, cannot be a violation of federal law.

The unlawful killing of another is historically a state crime and cannot be prosecuted in federal court unless the murder occurs in a place or under circumstances that confer subject matter jurisdiction on the federal court. Here, the government had to prove beyond a reasonable doubt that Lorton was within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. §1111(b); *See, Hackathorn v. Decker*, 243 F.Supp. 22 (D.C. Tex. 1965), affirmed 369 F.2d 150, *cert. denied* 88 S.Ct. 30, 389 U.S. 940, 19 L.Ed.2d 294.

In this case, the court of appeals held that its decision in *United States v. Young, supra,* resolved the issue and that "following *Young,* crimes committed at Lorton Reformatory fall within the special maritime and territorial jurisdiction of the United States". App. 5a. Petitioners contend that *Young* is not controlling, and that even if it were, that the decision is wrong.

In *Young,* the court of appeals held that "the United States District Court for the Eastern District of Virginia has **original** (emphasis added) jurisdiction for crimes committed at Lorton Reformatory and this includes criminal charges for violation of the D.C. Code and for violation of Virginia criminal laws assimilated by 18 U.S.C. §13." *Young,* 916 F.2d at 150.

In the present case, the Fourth Circuit did not

address the fact that petitioners conceded that the district court had original jurisdiction over the place where Lorton is located, but had challenged the subject matter jurisdiction on appeal due to the nature of Lorton as a District of Columbia penal institution and thus not a part of the special maritime and territorial jurisdiction of the United States.

The federal court in each district has original jurisdiction over crimes against the United States that occur in the United States and are committed within their district. 18 U.S.C. §3231; Article III, United States Constitution. The United States District Court for the Eastern District of Virginia therefore has original jurisdiction over crimes committed against the United States that occur within the Eastern District of Virginia. The

question presented is whether murder at the Lorton Reformatory is a crime against the United States.

In order for murder to be a crime against the United States the killing must occur within the special maritime and territorial jurisdiction of the United States.[3]

The special maritime and territorial jurisdiction of the United States is limited to "any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof..." 18 U.S.C. §7(3). The only exception are lands acquired with consent of the State legislature, where there exist concurrent

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3 The federal murder statute is not as broad as federal drug charges under 21 U.S.C. §841 that makes it a federal crime to traffic in narcotics anywhere in the United States and not just within the special maritime and territorial jurisdiction of the United States.

subject matter jurisdiction, when the acquisition is for the erection of a fort, magazine, arsenal, dockyard or other needful building. 18 U.S.C. §7(3).[4]

The phrase "United States", by definition, excludes States, Territories, District and thus, it excludes the District of Columbia. Congress's intent in limiting the term "United States" to the federal government is plain when 18 U.S.C. §7(3) is compared to 18 U.S.C. §9. Under 18 U.S.C. §9 Congress expanded the definition of "vessel of the United States" to include vessels belonging to the United States, or any corporation created by or under the laws of the United States, States, Territory, District, or possession thereof.

The limitation for "lands" is apparent when

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[4] Implicit in these definitions is that the building or place is for the use and benefit of the United States.

it is also compared with the more expansive definition of "aircraft" under 18 U.S.C. §7(5) which includes aircraft "...belonging to the United States...or any State, Territory, district, or possession thereof..."

Because Congress did not expand the definition of "lands" in the same manner as in other sections, it excluded certain crimes that occur on property used by governmental entities other than the United States. Thus "lands" refer to places known as federal enclaves. Petitioners seek review of the court of appeal's decision that identifies Lorton as a federal enclave.

The enabling statute in which Congress appropriated monies to finance the construction of Lorton is found under 35 Stat. 688 (60th Cong. 1909). Congress defined the statute as "An Act Making

appropriations to provide for the expenses of the government of the District of Columbia . . . " The enabling act demonstrates that the use of Lorton was reserved for the use and benefit of the government of the District of Columbia and not acquired by the United States for its own use.

In *United States v. Lewis*, 253 F. 469 (S.D.Cal. 1918) the court distinguished between lands obtained for the benefit of the United States and lands acquired by the United States for the benefit of another. The trial court properly refused to accept the government's characterization that lands acquired by the United States were automatically included within the special territorial jurisdiction of the United States. *Id.* at 472.

Significantly, the court based its decision on the fact that the enabling statute for the acquisition

of the homestead stated that it was an "...act making appropriations for the current and contingent expenses of the Indian tribes ...." *Id.* at 471. This language of the enabling statute mirrors the enabling statute that financed the construction of Lorton. The only difference between the two is that in this case, Lorton was acquired for the use and benefit of the government of the District of Columbia.

Furthermore, Lorton is not presently under either the exclusive or concurrent jurisdiction of the United States as required under 18 U.S.C. §7(3). Lorton is under the exclusive control and jurisdiction of the District of Columbia.

In *United States v. Gibson*, 880 F.2d 795 (4th Cir. 1989) the Fourth Circuit held that Lorton, for purposes of 18 U.S.C. §1791, was not a federal penal

facility even though it houses federal prisoners. In *Gibson*, the court looked to D.C. Code §24-442 and concluded that the statute established Lorton Reformatory as an institution of the District of Columbia. *Gibson*, 880 F.2d at 797.

If Lorton is not a federal prison, it cannot and has not been deemed under the exclusive or concurrent jurisdiction of the United States.

Judge Wald of the Circuit Court of Appeals for the District of Columbia, exhaustively examined the legal and actual relationship between Lorton and the Federal Government. *Cannon v. United States*, 645 F.2d 1128 (D.C. Cir. 1981). In *Cannon*, Judge Wald concluded that Lorton is no different from other agencies belonging to the District of Columbia, and that it is, therefore, an entity separate and apart from the Federal Government.

Id. at 1135-1140.[5]

In 1912, this Court in *Johnson v. United States*, 225 U.S. 405, 56 L.Ed. 1142, 32 S.Ct. 748 (1912) examined the relationship of the District of Columbia to the special maritime and territorial jurisdiction of the United States. In *Johnson*, the defendant was convicted of murder in the District of Columbia Supreme Court. In 1912, a defendant who was convicted of murder under the D.C. Code was sentenced to death. At the same time, a defendant who was convicted of murder under the federal statute was also sentenced to death but could

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5 The government adopts inconsistent positions regarding the status of Lorton. In the *Cannon* case the government successfully argued that Lorton is not a federal institution. It disclaimed an interest under that case and then turns around and in the present case claimed Lorton as a federal enclave because it chose to prosecute murders that occur at Lorton.

obtain a qualified jury verdict under which the sentence of death could be reduced to life imprisonment.

The defendant, who was convicted in murder under the D.C. Code claimed that he was entitled to the jury qualification because the murder occurred in the District of Columbia, which by default was within the special maritime and jurisdictional territory of the United States, and thus, the act was controlled by the federal murder statute. In *Johnson,* this Court said that "The District of Columbia can hardly be said...to be in any proper or adequate sense lands reserved for the exclusive use of the United States." This Court held that a murder that occurs in the District of Columbia does not necessarily fall under the federal criminal code and that it is entirely consistent with

Congressional intent to treat the District of Columbia as a jurisdiction separate and apart from those territories reserved for the United States.[6]

Petitioners argue, as they did below, that if Lorton is not a federal institution, murders which occur on its land cannot be prosecuted in federal court and must instead be prosecuted in state court. To expand the jurisdiction of the federal court to include all crimes occurring on the premises used by another governmental unit would violate the limitations which exist under the special maritime

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[6] Congressional intent to treat the District of Columbia as a different jurisdiction can also be found in D.C. Code §11-502, where Congress specifically conferred upon the United States District Court for the District of Columbia concurrent jurisdiction over certain crimes committed in the District of Columbia. If the government's position that any crimes committed on lands used by the District of Columbia confer jurisdiction on the federal court, there would be no need for this statute.

and territorial jurisdiction provision of 18 U.S.C. §7(3).

If Lorton is not a federal penal institution, it is not the federal enclave that Congress intended to govern under the special maritime and territorial jurisdiction of the United States. If ultimately whether 18 U.S.C. §7(3) applies is decided by "practical usage and dominion exercised....by the United States government," *United States v. Erdos*, 474 F.2d 157, 159 (4th Cir. 1973) then the federal court had no jurisdiction in this case.

Federal enclaves which are under the exclusive jurisdiction of the United States can be military bases, federal correctional institutions and federal office buildings. Federal enclaves which are under the concurrent jurisdiction of the United States can be federal highways, national parks and

any part of a military base shared with local government. Lorton falls under neither category.

If the ruling of the Fourth Circuit is allowed to stand, residents of the District of Columbia will suffer the inequities of being forced into the jurisdiction of the federal court simply because Lorton happens to be located in Virginia instead of the District. This inequity is yet another example of how citizens of the District of Columbia suffer from being disenfranchised. The inequities of treating petitioners as federal criminal defendants violates the constitutional separation between federal and state courts and must be reviewed by this Court.

II. The Trial Court Violated the Petitioners Sixth Amendment Rights By Erroneously Allowing Prejudicial Evidence To Be Considered By The Jury.

The petitioners request that this Court

review this issue on Constitutional grounds because the ruling of the Fourth Circuit Court of Appeals will result in curtailment of the petitioner's Sixth Amendment right to confront witnesses.

The Fourth Circuit affirmed the trial court's ruling that a government witness may, on redirect examination, testify about other crimes the petitioner committed in order to explain the bias of the witness when the petitioner has cross examined the witness and elicited the fact that the petitioner is biased.

The petitioners contend that the trial court erred by denying a motion for a mistrial after the prosecutor improperly elicited information from its witness, Travis Cameron, that revealed an alleged prior bad act of the petitioner to the jury. The

evidence did not conform to any of the exceptions that allow the admission of evidence of other crimes under Federal Rule of Evidence 404(b). Moreover, the government had not provided this information to the court when asked prior to the start of the trial whether it intended to use any 404(b) evidence; nor did the government reveal prior to questioning the witness that it intended to elicit 404(b) evidence.

Travis Cameron, who claimed to be an eyewitness to the murder, was the government's key witness in this case. During the cross-examination of Cameron, the following colloquy was exchanged:

Q: You would like – let me ask you this question, Mr. Cameron. Do you remember our interview on May 7th?

A: Yes, I do.

Q: Do you remember what you told me you wanted to do to Bobby Hazel?

A: Yes, I do.

Q: What did you say?

A: Kill him.

Q: Isn't that the worst of all possible punishment?

A: Yes.

Thereafter, the prosecutor asked the following questions on redirect:

Q: Why didn't you like Mr. Hazel at that time?

A: Because he sexually assaulted me.

After Cameron's answer, the defense objected and moved for a mistrial. The court, after commenting to the prosecutor, "[y]ou must have known that question was going to prompt that answer," sustained the objection but nonetheless

denied the motion for a mistrial. The court then instructed the jury that last question has nothing to do with this case. The jury is directed to disregard it."

Prior to sentencing, the petitioners filed motions for new trials, asking the court to reconsider its rulings denying a mistrial. The court denied the motions, and decided that the information elicited by the prosecutor was proper in light of the preceding cross examination. The Fourth Circuit affirmed the trial court's ruling, saying that

> [b]ecause Hazel placed the issue of bias into the scope of cross-examination, it was entirely appropriate for the government to establish on redirect examination why Cameron harbored such a bias against Hazel. In any event, even if the government's redirect examination was improper, any error was undoubtedly harmless.

App. 4a-5a.

The petitioners contend that evidence is not a proper subject matter for exploration of the reason for the bias of a witness. While questions designed to elicit witness bias are proper, there is a limit to how far bias may be probed and, in this case, that limit was exceeded in two respects.

First, it was completely unnecessary for the jury to learn why the witness was biased against the petitioners when the fact of the witness' bias was already before the jury. The testimony had no probative value, particularly since the reason proffered was completely unrelated to the charged offense.

Secondly, the reliability of the witness's proffer of why he was biased was never established and was highly prejudicial to the petitioner due to the nature of the other crime that was revealed to

the jury. Under none of the enumerated exceptions to Rule 404(b) would this evidence be admissible in and of itself. There is no basis for its admissibility to explain the bias of a witness.

If a new exception to the admissibility of Rule 404(b) evidence is created to explain the bias of a government witness, criminal defendants will be reluctant to ask questions that elicit the fact that a witness is biased. This places criminal defendants in the position of curtailing their Sixth Amendment right to confront witnesses in a crucial way by foregoing the opportunity to show the jury that a government witness is biased. Because of the effect of the Fourth Circuit's ruling on the petitioner's exploration of a witness' bias, the petitioner requests that this Court review this issue on Constitutional grounds.

The threshold inquiry a court must make before admitting evidence under Rule 404(b) is whether the evidence is probative of a material issue other than character. *Huddleston v. United States*, 485 U.S. 685, 108 S.Ct. 1496 (1988). The standard in the Fourth Circuit governing the admissibility of evidence offered pursuant to Rule 404(b) provides that such evidence is admissible only if the prior other crime evidence is relevant to an issue other than character, is necessary, and is reliable. *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988). In this matter, the evidence that the petitioner allegedly sexually assaulted Cameron does not satisfy the threshold inquiry required by this Court nor does it satisfy the standard for admissibility of the Fourth Circuit. The evidence did not serve any of the purposes enumerated in

Rule 404(b) that would allow it to be admitted. The evidence was not material to any issue in the case and served only to show the jury that the petitioner has a propensity for assaultive behavior. The petitioners have found no authority for the rationale behind the admission of the evidence in this case: that 404(b) evidence may be admitted to explain why a witness has certain feelings about a defendant.

The specific instances cited in Rule 404(b) when evidence of other crimes may be probative, "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," are absent in this case as to the admission of the sexual assault evidence.

The government claimed below that it was necessary to have Cameron explain why he disliked

Hazel so that the jury would not think it was related to any of the events surrounding the murder. The government cited *United States v. Bilzerian*, 926 F.2d 1285, 1296 (2nd Cir.), *cert. denied*, 112 S.Ct. 63 (1991) for the proposition that "evidence whose probative value might not ordinarily outweigh its prejudicial effect if offered on direct examination is admissible to rebut testimony elicited on cross examination that created a false impression."

However, Cameron's testimony did not create a "false impression." Cameron testified forthrightly that he did not like the petitioner and would like to kill him. Once the bias of the witness was established, it made no material difference whether the bias stemmed from events surrounding the murder or unrelated events. The

purpose of establishing the bias is for the jury to know that the witness is not testifying from a neutral vantage point and to weigh that accordingly when assessing the credibility of the witness. The fact that Cameron disliked the petitioner because the petitioner allegedly sexually assaulted Cameron rather than because of anything related to the murder did not mitigate the fact that Cameron was biased. Whatever the reason for the bias, it is the fact of the bias itself that the jury has to weigh when assessing the credibility of the witness.

In addition to the fact that there was no basis for the admissibility of the evidence, its reliability was never established. The evidence of other crimes consisted of a single uncorroborated allegation by Travis Cameron that he had been sexually assaulted by the petitioner. The reliability

of other crimes evidence has been found to be sufficient where it is corroborated by more than one witness. *United States v. Hadaway*, 661 F.2d 214, 218 (4th Cir. 1982). In this case, there was no corroboration of Cameron's testimony. No supporting details regarding the alleged assault were provided, such as when or where it occurred. The evidence lacked any indicia of reliability, particularly coming from a witness who had received consideration from the government for his testimony.[7]

Finally, even if the evidence had been material and reliable, the government flagrantly violated the notice provision of Rule 404(b).

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[7] Cameron testified that in return for his cooperation with the government, his "safety" was promised. He also conceded that the F.B.I. had put money in his jail account.

Notwithstanding the fact that the petitioner, according to the courts below, "opened the door" to redirect on the issue of bias, the government still should have complied with the provision of Rule 404(b) that requires notice "during trial if the court excused pretrial notice on good cause, of the general nature of any such evidence it intends to introduce at trial."[8]

Even where the trial court has found that other crimes evidence is admissible on 404(b) grounds, the court must also weigh the probative value against the prejudicial effect in accordance with Federal Rule of Evidence 403 before allowing it to be admitted. Rule 403 provides that:

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[8] In this case, the court did not have an opportunity to excuse pretrial notice because the government never represented that it had this evidence when the court made pretrial inquiry about 404(b) evidence.

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

That the other crimes evidence in this case is more prejudicial than probative is effectively conceded by the government in its reliance on *United States v. Bilzerian, supra,* (to argue that the admissibility of evidence that would otherwise be more prejudicial than probative is permissible on redirect to correct a false impression.)

As previously noted, the sexual assault evidence had no relevance to the elements necessary to prove the murder charge.

By contrast, the testimony that the petitioner had committed a sexual assault caused extreme prejudice because it served no purpose other than

to cause the jury to infer a propensity to commit a criminal offense. This inference was heightened in the circumstances of this case, where the offense took place in a penitentiary and the jury knew the petitioner was serving a sentence at the time the offense took place. Such evidence when admitted against incarcerated petitioners may reinforce the improper notion that the petitioner had a "propensity to commit assaults on other prisoners or his general propensity to commit violent crimes." *United States v. Sanders*, 964 F.2d 295, 299 (4th Cir. 1992). As the underlying purpose of Rule 404(b) is to exclude propensity evidence, there is a higher standard of care required when other crimes evidence is admitted and the jury knows the petitioner is incarcerated. *See United States v. Harman*, 349 F.2d 316, 320 (4th Cir. 1965).

The prejudicial effect of the other crimes evidence was heightened given the overall weakness of the government's case, which depended entirely upon the testimony of two witnesses, neither of whom were particularly credible. Cameron was serving a sentence of up to thirty six-years for manslaughter while armed and Hollingsworth had nine prior convictions and only came forward after he was informed that his cooperation might result in a reduced sentence for assaulting a correctional officer. In these circumstances, any evidence that would enhance the credibility of these witnesses and undermine the jury's view of the petitioners would enhance the government's case. The 404(b) evidence did just that.

Under the circumstances of this case, it

cannot be said with fair assurance that the jury's verdict was not "substantially swayed by the erroneous admission of this obviously damaging evidence." *United States v. Sanders, supra* at 300. The admission of this evidence, contrary to the view of the Fourth Circuit Court of Appeals, was not harmless error.[9]

The Fourth Circuit held that the petitioner

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[9] The prejudice against petitioner, Bobby Hazel, also prejudiced his copetitioner, Homer Richards. The charges brought against the petitioners placed them as partners in the murder. In this case, once the jury was prejudiced against Hazel it is likely they held Richards in the same light. *See Hamilton v. United States*, 409 F.2d 928 (5th Cir. 1969) (where prejudice from other crimes evidence appears to affect only one petitioner, prejudice is apt to spill over to other petitioner if the government's case against both petitioners went "hand-in-hand".) In this case, the case against the petitioners was such that either both or neither would be convicted. Therefore, reversible error against Hazel also constitutes reversible error against Richards.

had opened the door to questions regarding the witness' bias because the petitioner raised the matter on cross examination. While it is true that the government is typically allowed, in the trial court's discretion, to ask questions on redirect about any matter raised in cross examination, there are limits to such questioning in certain instances. The petitioners contend that in a case such as this one, where the government's questions on redirect elicited testimony that would otherwise not have been admissible and that was entirely unnecessary[10], the "open door" doctrine does not

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10 Even assuming *arguendo* that the government's purpose in asking the question about why the witness disliked the petitioner was relevant, the question could have been framed in such a manner that the witness would have answered that his dislike was not related to the murder case. This would have served the government's purpose without eliciting the prejudicial testimony.

apply.

Under the rule of curative admissibility, or the "opening the door" doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission. *See United States v. Whitworth*, 856 F.2d 1268 (9th Cir. 1988) (citations omitted) (Question during redirect examination asking coconspirator in spy ring whether he had suspicions that espionage petitioner knew that real buyers of information were Soviets asked the coconspirator to speculate about petitioner's state of mind and was not exploring a door opened by petitioner's cross examination as to whether coconspirator had suspicions regarding petitioner's

sincerity.) The doctrine does not permit the introduction of evidence that is related to a different issue or is irrelevant to the evidence previously admitted. McCormick on Evidence § 57 (3d ed. 1984). As has been discussed, *supra*, there was no "false impression" created during the cross examination that needed to be rebutted by otherwise inadmissible evidence and the other crimes evidence was not relevant to the charges. The 404(b) evidence was not properly admitted under the "open the door" doctrine.

Additionally, the Seventh Circuit in *Young v. Rabideau*, 821 F.2d 373 (7th Cir. 1987), held that it would not expand Rule 404(b) to include bias as a category justifying the admissibility of prior bad acts evidence. *Young* was a civil case in which an inmate was suing correctional officers for civil

rights violations. The petitioners sought to admit evidence of past misconduct of the plaintiff, his prison disciplinary history, to show that he was biased against authority. While the court indicated that the analysis of bias in a civil case may be different than that in a criminal context, the rationale it ultimately used to decline to create a 404(b) exception for bias is applicable in the criminal context:

> [w]e believe that bias, like pattern, may show intent or another Rule 404(b) ground, but that it is more likely to prove bad character or a propensity toward violent behavior by inferring that the prisoner acted in conformity with his prior bad acts.

Id. at 379.

While the instant case is distinguishable because the bad act was used to show the bias of a witness rather than the bias of the petitioner, the reasoning that it shows propensity behavior in this

context is applicable. Moreover, if the reason for the bias is relevant at all, it is more relevant in the context of explaining the bias of one party toward the other than it is in explaining the bias of a witness. The logic against creating a bias exception for Rule 404(b) evidence is stronger in this case than in *Young*, in which the Seventh Circuit declined to formulate such an exception.

In sum, the petitioner did not "open the door" to the introduction of inadmissible 404(b) evidence by asking the witness questions that showed the jury that the witness was biased. There is no bias exception for the admissibility of 404(b) evidence. The court's ruling, if broadly applied, would have the effect of substantially inhibiting a criminal petitioner's unfettered exercise of his Sixth Amendment right to fully examine his accusers by

exploring those witnesses' bias against him. For to venture into this area would be at such great risk that many criminal petitioners would simply forego the opportunity. The chilling effect of the court's holding is fundamentally inconsistent with the vigorous cross-examination that is a vital element of a petitioner's ability to defend himself when accused of a crime.

Moreover, that limitation is absolutely unnecessary when, as in the instant case, the 404(b) evidence is not probative and the government's purpose could be served without the damaging evidence. This court should grant the petition for certiorari because of the damaging effect that the court's ruling would have on an important constitutional right.

III. The District Court And Court Of Appeals

Improperly Denied The Petitioner's Motion For New Trial

The denial of the petitioner's motion for new trial by the District Court and the affirmance of that ruling by the Fourth Circuit Court of Appeals was based on the court's conclusion that the newly discovered evidence was merely impeaching. The petition for certiorari should be granted for two reasons (1) The court of appeals erred in holding that the evidence was merely impeaching as the newly discovered evidence was directly connected to the issue of the petitioner's guilt as well as the question of who committed the murder of Gregory Ford; (2) The need to clarify and establish a uniform standard to handle newly discovered evidence that demonstrates the government's use of perjured testimony. Petitioners request this Court to define a

standard requiring only that a finding that newly discovered evidence **might** have resulted in an acquittal to warrant a new trial where such evidence completely undermines critical evidence in the government's case as was true in the instant case.

The petitioners' Motion for New Trial, brought pursuant to FRCP Rule 33, was premised on the affidavits of five witnesses, each of whom provided information that bore directly on the central question of who murdered Gregory Ford.

In two memorandum opinions and accompanying orders the district court denied the petitioner's motions. In the two rulings, the court, citing the Fourth Circuit standard established earlier in *United States v. Chavis*, 880 F. 2d 788,

793 (4th Cir. 1989)[11] held that the evidence contained in the affidavits was no more than additional impeachment of Basknight and Cameron. The court also ruled that "their proffered testimony, even if it is more than merely impeaching, would not probably result in an acquittal on retrial."

The court of appeals agreed with the District Court that the newly discovered evidence did not satisfy the third prong of the *Chavis* standard that

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[11] The standards required for the granting of a motion of new trial is.

> (i) Is the evidence, in fact newly discovered; (ii) are the facts alleged from which the court may infer due diligence on the part of the movant; (iii) is the evidence not merely cumulative or impeaching; (iv) is the evidence material to the issues involved and (v) would the evidence probably result in acquittal in a new trial.

the evidence not be merely cumulative or impeaching.

The basis for the District Court's holding as well as the ruling of the United States Court of Appeals centered around the court's assertion that the newly discovered evidence was merely impeaching. Both courts completely misconstrued the nature of the newly discovered evidence and its' significance within the context of the entire trial as the evidence showed that persons other than the defendants, specifically David Basknight and Travis Cameron, had committed the murder.

It was undisputed that the two primary government witnesses David Basknight and Travis Cameron were present at the time of Ford's murder. It was also undisputed that Basknight had been assaulted by Ford two weeks before Ford's

murder and that Basknight therefore had an incentive to do harm to Ford. Finally, the evidence established that Basknight and Cameron had been together on the day of Ford's murder and that a relationship existed between the two men.

At trial, Cameron was one of two eyewitnesses to the murder. Of the two eyewitnesses, Cameron emerged as a far more persuasive and credible witness than Marshall Hollingsworth, the other eyewitness.[12] Basknight was also central to the government's case as he provided critical contextual information about the reasons why the murder occurred. The

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[12] Hollingsworth did not come forward as an eyewitness until ten months after the murder. Moreover, Hollingsworth admitted that he hoped to have his sentence reduced as a result of his willingness to cooperate with the government by testifying at the petitioner's trial.

government's theory was that Ford had disclosed to Basknight, after Basknight had questioned him about the prior assault, that the petitioners had hired him to commit the assault. Thus, through Basknight's testimony the government was able to establish that the petitioners had a motive to murder Ford.

The newly discovered evidence taken in its totality showed that Cameron and Basknight working in concert with each other murdered Ford to avenge Ford's prior assault on Basknight. Additionally the evidence showed that after the murder, Basknight acted to clean up the crime scene while Cameron moved the decedent's body to another location and then removed the murder weapon from the immediate vicinity.

The newly discovered evidence satisfied the

fifth and final prong of the *Chavis* standard as the affidavits would have in all likelihood caused an acquittal at the petitioners' trial. Both by impeaching and undermining the credibility of the government's two most important witnesses and by showing that those two witnesses were Ford's real murderers, the jury would almost certainly have found the petitioners not guilty of these offenses.

As stated above the court has in *Chavis v. United States, supra,* articulated a five prong standard for motions for a new trial that are based on newly discovered evidence. In the instant case both in the District Court and the United States Court of Appeals, the court focused on the element of the *Chavis* test which required that the newly discovered evidence not be merely impeaching.

However the court also made reference to the last elements of the *Chavis* rule which requires that the evidence would probably result in an acquittal at a new trial.

In that regard, the court below erred because the court failed to assess the newly discovered evidence pursuant to the standard first established in *Larrison v. United States,* 24 F.2d 82 (2nd Cir. 1928) and elaborated on in the cases of *United States v. Taglia,* 922 F.2d 413, 415-16 (7th Cir. 1991); *United States v. Wallace,* 525 F.2d 863 (4th Cir. 1976); *United States v. Stofsky,* 527 F.2d 237 (2nd Cir. 1975) *cert. denied,* 429 U.S. 891, 97 S. Ct. 65, 50 L.Ed. 2d 80 (1976) amongst others.

A further reason for granting this petition is the unsettled state of the law with respect to the *Larrison* case. In *Larrison* the court held that where

newly discovered evidence tends to indicate that a government witness has provided perjured testimony at trial, the court should not deny the motion for new trial merely because the evidence is impeaching. Instead the court should grant a new trial when:

a. The court is reasonably well satisfied that the testimony given by a material witness is false.

b. That without it the jury might have reached a different conclusion.

c. That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

In *Mezarosh v. United States*, 352 U.S. 1, 77 S. Ct. 1, L.Ed.2d 1 (1956), this Court held that a motion for new trial must be granted where a government witness' false testimony before a Senate Committee that occurred simultaneously with the witness' trial

testimony unavoidably tainted the entire trial proceedings.

The Seventh Circuit adopted the *Larrison* standard in *Taglia, supra.* In *Taglia,* the court noted that the "interest of justice" standard as provided for in Rule 33 is incompatible with a categorical distinction between types of evidence. Thus the court stated that, if the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered at trial to be utterly unworthy of being believed because he had lied in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted." *Taglia, supra* at 415.

The Fourth Circuit previously appeared to embrace the *Larrison* test in *United States v.*

Wallace, supra. In *Wallace,* the Fourth Circuit held that the trial court had misconceived the proper scope of inquiry when the court held that a motion for new trial could not be granted unless there was "prosecutorial misconduct by way of intimidation or threats to testify falsely." *Wallace,* 528 F.2d at 866. Since the district court failed to apply the *Larrison* standard, the Court of Appeals remanded the case for a new determination in accordance with *Larrison.*[13]

Over the last fifteen years, however, a clear

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13 Other cases where the court has adopted *Larrison* include *United States v. Anderson,* 509 F.2d 312 (D.C. Cir. 1979) *cert. denied,* 420 U.S. 991, 95 S. Ct. 1427, 43 L.Ed.2d 672 (1975); *United States v. Johnson,* 487 F.2d 1278, 1279 (4th Cir. 1983); *United States v. Meyers,* 484 F.2d 113 (3d Cir. 1973); *United States v. Briola,* 365 F.2d 1018 (10th Cir. 1972); *United States v. Curran,* 465 F.2d 260 (7th Cir. 1972); *United States v. Strowes,* 443 F.2d 986 (1st Cir.) *cert. denied* 404 U.S. 851, 92 S. Ct. 87, 30 L.Ed.2d 90 (1971); *United States v. Smith,* 433 F.2d 149 (5th Cir. 1970).

split among the Circuits has evolved with regard to the standard to be applied to a motion for a new trial. The Second Circuit in *Stofsky, supra,* backed away from the *Larrison* requirement that held that once it had been shown that a material witness had committed perjury, a motion for newly discovered evidence must be granted where the jury might have acquitted had they known of the evidence. Expressing concern that the *Larrison* test "if literally applied" would result in reversal where a witness has committed perjury related even to minor matters, the court opted to apply a probability standard.

The Ninth Circuit has followed the lead of the Second Circuit by rejecting a *per se* rule requiring reversal of a denial of a motion for new trial where newly discovered evidence established

that a material witness had committed perjury at the petitioner's trial. *United States v. Krasny*, 607 F.2d 840 (9th Cir. 1979); *United States v. Davis*, 960 F.2d 820 (9th Cir. 1972).

In these cases, the courts promulgated a middle ground between *Larrison* and *Stofsky*. On the one hand, the court in *Krasny* and *Davis* held that where evidence showed that the bulk of a key witness' testimony" was false, a court could properly grant a new trial even where the evidence was "merely impeaching". *Krasny, supra* at 845. On the other hand, the court held that the "time honored" probability standard requiring that the court make a finding that the newly discovered evidence probably would result in an acquittal was less speculative than the *Larrison* test and therefore preferable.

In the present case, both the district court and the court of appeals have reverted to this standard despite substantial evidence that petitioners were wrongfully convicted.

The Court should therefore grant this petition to establish a uniform standard on motions for newly discovered evidence. In particular, it is strongly urged that the "categorical distinction" into types of evidence is inconsistent with the mandate of FRCP, Rule 33 providing that motions for a new trial must be granted when to do so is in the interests of justice. Instead of utilizing a mechanical formula, courts should evaluate the importance of newly discovered evidence on a case by case basis. Crucial to this analysis is an assessment of the effect of the newly discovered evidence on the government's evidence at trial Where evidence as

in the instant case, thoroughly eviscerates a central portion of the government's evidence, this Court should lessen the standard to only require motions for a new trial to be granted when newly discovered evidence might result in an acquittal.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on this 14th day of November, 1994, in accordance with Rules 12 and 29 of the Rules of the United States Supreme Court, I mailed, by certified mail, postage prepaid, forty (40) copies of the Joint Petition for Certiorari to the Clerk of the United States Supreme Court and that three (3) copies of the Joint Petition for Certiorari were mailed, to:

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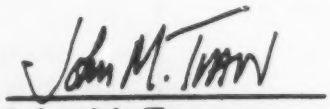

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ON BEHALF OF PETITIONERS
BOBBY HAZEL AND HOMER L. RICHARDS

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BOBBY HAZEL, *Defendant-Appellant.*	No. 93-5659
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. HOMER RICHARDS, *Defendant-Appellant.*	No. 93-5660
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BOBBY HAZEL; HOMER RICHARDS, *Defendants-Appellants.*	No. 94-5208
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BOBBY HAZEL, *Defendant-Appellant.*	No. 94-5272

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HOMER RICHARDS,
Defendant-Appellant.

No. 94-5285

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CR-93-62-A)

Argued: June 10, 1994

Decided: August 16, 1994

Before WIDENER, HALL and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Peter Neil Mann, Washington, D.C., for Appellant Hazel; John M. Tran, GREENBERG, BRACKEN & TRAN, Alexandria, Virginia, for Appellant Richards. John T. Martin, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Cary S. Greenberg, GREENBERG, BRACKEN & TRAN, Alexandria, Virginia, for Appellant Richards. Helen F. Fahey, United States Attorney, Cathleen A. Tutty, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See LO.P. 36.5 and 36.6.

OPINION

PER CURIAM:

On February 11, 1993, a federal grand jury sitting in the Eastern District of Virginia returned a three-count indictment against Bobby Hazel and Homer Richards. Count one charged Hazel and Richards with first degree murder, 18 U.S.C. §§ 1111 and 2, for the killing of Gregory Ford. The indictment also charged Hazel (count two) and Richards (count three) with possession of a dangerous weapon, 18 U.S.C. § 13 (assimilating Va. Code Ann. § 52.1-203(4)). On May 19, 1993, a jury found Hazel guilty of first degree murder and Richards guilty of the lesser included offense of second degree murder. In addition, the jury returned verdicts of guilty on counts two and three. The district court sentenced Hazel to life imprisonment and Richards to 235 months' imprisonment. Hazel and Richards noted timely appeals. On November 26 and December 6, 1993, respectively, Hazel and Richards filed motions for new trials based on newly discovered evidence. *See* Fed. R. Crim. P. 33. On December 17, 1993, the district court denied the motions, and Hazel and Richards noted timely appeals. On March 18 and 21, 1994, respectively, Hazel and Richards filed another series of motions for new trials based on additional alleged newly discovered evidence. The district court denied these motions and Hazel and Richards noted another set of appeals. We consolidated the various appeals on April 12, 1994 and now affirm.

I

The facts of this case concern the murder of inmate Gregory Ford at the Lorton Reformatory, which is located at Lorton, Virginia, within the Eastern District of Virginia. The defendants and the material witnesses proffered by the government were also inmates at the Lorton Reformatory on the day Ford was killed.

Thomas Dinsmore testified that in May 1992 Richards told him that Ford owed Richards money and that Richards indicated that he

was going to have to "hurt" Ford. (J.A. vol. 1 23). Thereafter, Richards and Hazel asked Dinsmore to hurt Ford in exchange for which a debt Dinsmore owed primarily to Richards would be erased.

David Basknight testified that on June 16, 1992, he heard an argument outside his room. As a result, Basknight hid behind a bed in the back of his room. Shortly thereafter, Basknight heard a body hitting the floor in his room. Basknight testified that he "stayed still for a while," (J.A. vol. 1 43), and then went to where Ford lay bleeding.

Two witnesses gave more damaging testimony. Travis Cameron testified that he saw Hazel and Richards stab Ford. Marshall Hollingsworth testified that he came upon the scene from a nearby stairwell and saw Hazel and Richards make aggressive hand motions toward Ford. Hollingsworth testified that he went back down the stairs and then returned, at which time Hazel and Richards were walking down the stairs past him. Hollingsworth continued up the stairs and saw Basknight standing over Ford.

II

During Cameron's cross-examination, counsel for Hazel elicited from Cameron that he did not like Hazel and wanted to kill Hazel. On redirect examination, the government asked Cameron why he harbored these feelings toward Hazel, to which Cameron testified that Hazel had sexually assaulted him. The district court sustained an objection to the question, but denied the appellants' motion for mistrial. In ruling on post-trial motions for a new trial based in part on the alleged prejudice which resulted from this question, the district court held, in retrospect, that it believed the question was proper in light of the preceding cross-examination and that, in any event, there was no prejudice to either appellant. Hazel and Richards argue that the district court's denial of the motion for mistrial, as well as the subsequent new trial motions, constitutes reversible error. We disagree.

The question placed by the government to Cameron was proper in light of the preceding cross-examination. On cross-examination, counsel for Hazel probed extensively into Cameron's bias against Hazel, going so far as to establish that Cameron would like to kill Hazel. Because Hazel placed the issue of bias into the scope of cross-

examination, it was entirely appropriate for the government to establish on redirect examination why Cameron harbored such a bias against Hazel. In any event, even if the government's question on redirect examination was improper, any error was undoubtedly harmless.

III

Hazel and Richards also contend that the district court erred in taking judicial notice of the fact that the Lorton Reformatory is in the special maritime and territorial jurisdiction of the United States. The appellants' argument is two-fold: first, they argue that the Lorton Reformatory is not within the special maritime and territorial jurisdiction of the United States; and second, they argue that, even if the Lorton Reformatory is within the special maritime and territorial jurisdiction of the United States, this was not properly the subject of judicial notice in the absence of supporting evidence from the government. We find no merit to these arguments.

We have previously held in a related context that the United States Sentencing Guidelines applied to crimes committed at the Lorton Reformatory, which is located in the Eastern District of Virginia. In reaching this ruling, we concluded "the United States District Court for the Eastern District of Virginia has original jurisdiction for crimes committed at Lorton Reformatory, which is located within that district, and this includes criminal charges for violation of the D.C. Code and also for violation of Virginia criminal laws assimilated by 18 U.S.C. § 13." *United States v. Young*, 916 F.2d 147, 150 (4th Cir. 1990). Following *Young*, crimes committed at the Lorton Reformatory fall within the special maritime and territorial jurisdiction of the United States.

We now turn to the argument that the district court erred in taking judicial notice of the fact that the Lorton Reformatory was within the special maritime and territorial jurisdiction of the United States. Fed. R. Evid. 201(b) provides:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court or (2) capable of

> accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

We believe the district court properly took judicial notice that the Lorton Reformatory fell within the special maritime and territorial jurisdiction of the United States. It is beyond cavil that Lorton Reformatory's status was generally known in the Alexandria Division of the Eastern District of Virginia and capable of ready accuracy from "sources whose accuracy cannot be reasonably questioned." *Id.**

IV

Finally, Hazel and Richards argue that the district court erred in denying their motions for new trials based on newly discovered evidence. The appellants' motions for new trials were based on what they contended was the newly discovered testimony of five witnesses, submitted to the district court in the form of affidavits.

We have established a five-part test for evaluating motions for new trials. *United States v. Chavis*, 880 F.2d 788, 793 (4th Cir. 1989). Under *Chavis*, Hazel and Richards must demonstrate: (1) that the evidence is newly discovered; (2) that there are facts alleged from which the court may infer due diligence on the part of the movant; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is material to the issues involved; and (5) that the evidence would probably result in acquittal in a new trial. *Id.* The burden of persuasion rests with the movant. The district court's denial of a motion for new trial based on newly discovered evidence should not be disturbed absent an abuse of discretion. *United States v. Plum*, 558 F.2d 568, 576 (10th Cir. 1977).

We shall briefly summarize the affidavits of the five witnesses proffered by the appellants. Jefferey Wells provided a sworn statement that, prior to the day Ford was killed, Ford assaulted Basknight and that Basknight and Ford had spoken on the day Ford was killed. Wells went on to say that, after lunch, he observed Ford and Bask-

*We also find no merit to the appellants' contention that the district court erred in instructing the jury with respect to the element of federal jurisdiction.

night arguing and saw Cameron retrieving a shank from a room. Wells further stated that he then left the dorm in order to obtain a weapon, for his own protection, and, upon returning to the dorm, saw Cameron running away with a bloody knife and saw Ford on the floor. Wells concluded by saying that he never saw either defendant in the dormitory that day. The motions for new trials indicate that Hazel acknowledged that counsel had spoken to Wells prior to trial but states that Wells then said he had witnessed none of the events surrounding the killing of Ford.

Wiggins' affidavit states that, prior to calling correctional officers to report Ford's injury, he saw Cameron pull Ford's body from Basknight's room to a common area of the dorm, and at that time Cameron had "blood splattered all over his shirt." (J.A. vol. 2 60). Wiggins' affidavit also indicates that in prior interviews with defense attorneys and the Federal Bureau of Investigation (FBI) Wiggins denied having knowledge of these events.

The affidavits of both Carlisle Gore and Edward Ford (no relation to the victim) state that Basknight stated in their respective presence that he was a defendant in the murder trial, that he killed Gregory Ford, and that he was not convicted because of a lack of evidence.

Finally, the affidavit of Donald Johnson states that he saw Cameron attack a person with a knife in the hallway and back that person into Basknight's room. Johnson's affidavit also states that Cameron allegedly went into the room. Following these events, Basknight purportedly left the room, returned with a mop and bucket, and reentered the room. Finally, Johnson's affidavit states that he told the FBI that he was not aware of what had happened.

We believe the affidavits submitted below, examined individually or cumulatively, did not warrant a new trial. Assuming that the evidence presented by Hazel and Richards is new, material, and could not have been discovered with due diligence, the evidence is merely additional impeachment of the testimony of Basknight, Cameron, and Hollingsworth. The evidence, therefore, fails to meet the third prong of the *Chavis* standard—that the evidence not be merely cumulative or impeaching. The evidence also fails to meet the final prong of the *Chavis* standard. We glean from our review of the record that this evi-

dence, if presented on retrial, would not probably result in acquittal in light of the strength of the government's case. As the district court noted: "[T]his was not a close case. Retrial, even with the added witnesses the defendants now proffer, would not probably produce a different result." (J.A. vol. 1 82). We agree.

AFFIRMED

APPENDIX I

Excerpt from Sentencing Hearing of
Homer L. Richards, Dated July 30, 1993

MR. GREENBERG: Your Honor, Mr. Starrs points out to me that perhaps it would be appropriate to just make a formal proffer that if we were to call Travis Cameron to the stand, he would testify that he had been raped by Bobby Hazel and that he had told the information to both Mike Soohy, the agent investigating the case, and he told us that he also told that to Ms. Cathy Tutty. . . .

(2)

No. 94-1057

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

BOBBY HAZEL AND HOMER L. RICHARDS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Lorton Reformatory in Lorton, Virginia, is within the special maritime and territorial jurisdiction of the United States.

2. Whether a government witness's statement that one petitioner had sexually assaulted the witness required a mistrial, where the district court sustained an objection and instructed the jury to disregard the statement.

3. Whether petitioners were entitled to a new trial based on new evidence.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Board of Supervisors v. *United States*, 408 F. Supp. 556 (E.D. Va. 1976), appeal dismissed, 551 F.2d 405 (4th Cir. 1977)	6-7
Bowen v. *Johnston*, 306 U.S. 19 (1939)	5
Cannon v. *United States*, 645 F.2d 1128 (D.C. Cir. 1981)	6, 8
District of Columbia v. *John R. Thompson Co.*, 346 U.S. 100 (1953)	7
Johnson v. *United States*, 225 U.S. 405 (1912)	7, 8
Larrison v. *United States*, 24 F.2d 82 (7th Cir. 1928)	11
Palmore v. *United States*, 412 U.S. 389 (1973)	7
Richardson v. *Marsh*, 481 U.S. 200 (1987)	9
Shannon v. *United States*, 114 S. Ct. 2419 (1994)	9
United States v. *Abel*, 469 U.S. 45 (1984)	10
United States v. *Braggs*, 23 F.3d 1047 (6th Cir.), cert. denied, 115 S. Ct. 274 (1994)	10
United States v. *Gibson*, 880 F.2d 795 (4th Cir. 1989)	8
United States v. *Kelly*, 790 F.2d 130 (D.C. Cir. 1986)	10
United States v. *Kimbrough*, 528 F.2d 1242 (7th Cir. 1976)	9
United States v. *Reed*, 887 F.2d 1398 (11th Cir. 1989), cert. denied, 493 U.S. 1080 (1990)	10
United States v. *Reyes-Alvarado*, 963 F.2d 1184 (9th Cir.), cert. denied, 113 S. Ct. 258 (1992)	10

Cases—Continued: Page

United States v. *Walker*, 25 F.3d 540 (7th Cir.), cert. denied, 115 S. Ct. 531 (1994) 10
Wisniewki v. *United States*, 353 U.S. 901 (1957) 8

Constitution, statutes and rule:

U.S. Const. Art. 1, § 8, Cl. 17 ..... 5, 7
Act of Mar. 3, 1909, ch. 250, 35 Stat. 717 5
Act of Aug. 5, 1909, ch. 7, 36 Stat. 122 5
Assimilative Crimes Act, 18 U.S.C. 13 2
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 8
18 U.S.C. 7(3) 5, 6, 7, 8
18 U.S.C. 1111 2
18 U.S.C. 1111(b) 5
18 U.S.C. 1791 8
40 U.S.C. 255 7
Va. Code § 19 (1919) 6
Va. Code Ann. §§ 7.1.-18.1 (Michie 1993) 7
1901-1902 Va. Acts 565-566 6
1912 Va. Acts 563 6
1936 Va. Acts 610-611 7
1940 Va. Acts 754-755 7
Fed. R. Evid. 404(b) 9-10

Miscellaneous:

Transfer of Lorton Reformatory to the District of Columbia: Hearings on S. 1243 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 5-6, 7

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 33 F.3d 53 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1994. The petition for a writ of certiorari was filed on November 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Hazel and Richards were convicted of first-degree and

second-degree murder, respectively, both in violation of 18 U.S.C. 1111. Both were also convicted of possession of a dangerous weapon, in violation of Virginia law and the Assimilative Crimes Act, 18 U.S.C. 13. Hazel was sentenced to life imprisonment, and Richards was sentenced to 235 months' imprisonment. The court of appeals affirmed. Pet. App. 3a.

1. In June, 1992, petitioners were inmates at Lorton Reformatory, which is located on federally owned land in the State of Virginia. Pet. App. 3a-4a. The evidence at trial established that petitioners stabbed and killed a third inmate, Gregory Ford, outside the room of a fourth, David Basknight. Travis Cameron testified that he saw petitioners stab Ford. Basknight testified that he heard an argument outside his room, heard Ford fall, and found him bleeding on the floor. Marshall Hollingsworth testified that as he came up some nearby stairs he saw petitioners make aggressive hand motions toward Ford; he retreated down the stairs and then returned, passing petitioners as they left down the stairs, and found Basknight standing over Ford's body. Thomas Dinsmore testified that petitioner Richards told him that Ford owed Richards money, and that petitioners had earlier asked him to "hurt" Ford as payment for a debt that Dinsmore owed primarily to petitioner Richards. *Ibid.*

On cross-examination, Cameron admitted that he did not like petitioner Hazel, and that he had previously told petitioners' counsel that he wanted to "kill" Hazel. Pet. App. 4a; Pet. 31. On redirect the government asked Cameron why he had those feelings, and Cameron replied that Hazel had sexually assaulted him. The district court sustained an immediate objection to the question, and directed the jury to disregard it. Pet. App. 4a; Pet. 32. In response to post-trial motions for a new trial based in part on alleged prejudice resulting from the

question and answer, the court held that in retrospect the government's inquiry was proper in light of the preceding cross-examination concerning the witness's bias, and that in any event petitioners were not prejudiced by any error. Pet. App. 4a.

Petitioners also based their request for a new trial on a claim of newly discovered evidence. Pet. App. 6a. In support, they produced statements from five Lorton inmates. One stated that Ford had assaulted Basknight on the day before Ford's death, and that the two had argued again on the day of the murder; that he had seen Cameron retrieve a "shank," or homemade knife, from a room; and that he later saw Cameron running away with a bloody knife while Ford lay on the floor. *Id.* at 6a-7a. Another stated that he saw Cameron pull Ford's body from Basknight's room to a common area of the dorm, and that Cameron's shirt was spattered with blood. Two more claimed that Basknight had stated to each of them that he was a defendant in the murder trial, that he killed Ford, and that he had been acquitted for lack of evidence. The last inmate stated that he saw Cameron attack someone in the hallway and back him into Basknight's room. Two of the new "witnesses" admitted that before trial they had told the FBI that they had no information about the murder; a third made a similar pre-trial statement to Hazel's lawyer. *Id.* at 7a. Observing that the case was "not * * * close" and that retrial with the new evidence "would not probably produce a different result," the district court denied the motion for a new trial. *Id.* at 8a.

2. The court of appeals affirmed. Pet. App. 1a-8a. Relying on a prior decision, the court held that the federal murder charge was proper because Lorton Reformatory is within the special maritime and territorial jurisdiction of the United States, and that the

district court properly took judicial notice of that fact. *Id.* at 5a-6a.

The court also held that the government's question about the reason for Cameron's bias against Hazel, and Cameron's answer that Hazel had sexually assaulted him, were "entirely appropriate" responses to the extensive probing of Cameron's bias on cross-examination. Pet. App. 4a-5a. In any event, the court held that even if the government's question was improper, under the circumstances "any error was undoubtedly harmless." *Id.* at 5a.

Finally, the court held that the district court did not abuse its discretion by denying petitioners' motion for a new trial on the basis of their belated evidentiary submissions. Pet. App. 6a-8a. The court explained that to obtain a new trial, a defendant must show that (1) the evidence was newly discovered, (2) he exercised due diligence in discovering the evidence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material, and (5) the evidence would probably result in an acquittal at a new trial. *Id.* at 6a. Applying that test, the court concluded that even if the affidavits submitted by petitioners were new and material and could not have been discovered earlier through due diligence, the evidence was "merely additional impeachment of the testimony of Basknight, Cameron, and Hollingsworth." *Id.* at 7a. In addition, based on its review of the record, the court of appeals agreed with the trial court that the evidence "would not probably result in acquittal" at a new trial. *Id.* at 7a-8a.

ARGUMENT

1. Petitioners contend (Pet. 14-28) that the district court lacked jurisdiction over the federal murder charges because the Lorton Reformatory (Lorton) is not

located "[w]ithin the special * * * territorial jurisdiction of the United States." 18 U.S.C. 1111(b). Under 18 U.S.C. 7(3), that jurisdiction includes:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

The language of Section 7(3) echoes that of Article I, Section 8, Clause 17 of the Constitution, which authorizes Congress to exercise "exclusive Legislation in all Cases whatsoever" over the District of Columbia, and

> to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

See *Bowen* v. *Johnston*, 306 U.S. 19, 22 (1939).

In 1909, Congress authorized and directed the Commissioners for the District of Columbia to purchase land in either Maryland or Virginia for the construction of a prison. Act of March 3, 1909, ch. 250, 35 Stat. 717; see also Act of August 5, 1909, ch. 7, 36 Stat. 122 (amending original act to require that title be taken in the name of the United States). The United States acquired the land comprising the entire Lorton complex (including the reformatory, the original Occoquan workhouse, and a variety of other facilities) by purchase or condemnation between 1910 and 1953. See *Transfer of Lorton Reformatory to the District of Columbia: Hearings on*

S. 1243 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary (hereinafter *Lorton Hearings*), 94th Cong., 1st Sess., 92-95 (1975) (District of Columbia Position Paper, Appendix VIII). The United States retains title to the land, but Congress has granted managerial control over the reformatory to the government of the District of Columbia. See generally *Cannon* v. *United States*, 645 F.2d 1128, 1135-1137 (D.C. Cir. 1981) (discussing relationship between the United States and the District of Columbia with respect to Lorton).

Petitioners argue (Pet. 15) that Lorton is not within the special territorial jurisdiction of the United States because it is managed and controlled by the District of Columbia. Section 7(3) does not require federal management, however; rather, it includes within federal jurisdiction lands "acquired" for the "use" of the United States or for the erection of public buildings. The United States acquired and maintains title to the land on which the reformatory is located, and it is to the United States that the State of Virginia has ceded exclusive or concurrent jurisdiction.[1] The District of Columbia is an

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[1] Under Section 7(3), land acquired for federal use generally lies within the special territorial jurisdiction of the United States either if it is acquired with the consent of the relevant State, or if the United States otherwise exercises "exclusive or concurrent jurisdiction" over it. The bulk of the land at Lorton (approximately 2,500 out of 3,000 acres) was acquired in the first two transactions, in 1910 and 1913. *Lorton Hearings*, pp. 5-6, *supra*, at 92-93. With respect to those tracts, Virginia law explicitly consented to acquisitions by the United States for public purposes, and ceded exclusive or concurrent jurisdiction over lands so acquired. See 1901-1902 Va. Acts 565-566; 1912 Va. Acts 563 (limiting consent); Va. Code § 19 (1919) (consenting and ceding jurisdiction with respect to "any land acquired, or to be acquired"

area of special constitutional status over which Congress exercises "exclusive Legislation," under the same provision of the Constitution that confers on Congress "like Authority" over the federal installations described in that provision and in the second clause of Section 7(3). U.S. Const. Art. 1, § 8, Cl. 17. Congress has, by statute, created a local governmental structure for the District, and delegated to it various powers; but that government exercises control over Lorton at Congress's discretion, and under overall federal jurisdiction. Congress retains ultimate and plenary constitutional power over the District's government and all its functions. See generally *Palmore* v. *United States*, 411 U.S. 389, 397-398 (1973); *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 104-110 (1953).

Petitioners' reliance (Pet. 24-25) on *Johnson* v. *United States*, 225 U.S. 405 (1912), is misplaced. In *Johnson*, the Court held that a previous version of 18 U.S.C. 7(3) did not apply to the territory of the District of Columbia

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by the United States for public buildings). See also *Board of Supervisors* v. *United States*, 408 F. Supp. 556, 564 n.10 (E.D. Va. 1976), appeal dismissed, 551 F.2d 305 (4th Cir. 1977) (Table). Present state law is similar. See Va. Code Ann. §§ 7.1-18.1 (Michie 1993) (applicable after June 30, 1981). For some years after 1936, however, the state consent and cession laws were limited in such a way that they may not have applied to the acquisition of the final 423 acres of the present Lorton property. See 1936 Va. Acts 610-611; 1940 Va. Acts 754-755; see also 40 U.S.C. 255. Petitioners do not argue, however, that the murder at issue in this case took place on that portion of the property. Cf. *Lorton Hearings*, pp. 5-6, *supra*, at 92-95 (characterizing only 1.5 acres of the post-1936 acquisitions as "reformatory" property). Both the question presented (Pet. i) and the text of the petition (Pet. 14-28) present only petitioners' argument that the entire reformatory falls outside federal jurisdiction because, and to the extent that, it is managed by the District of Columbia.

itself, because the statutory reference to "acquired" lands "has a proprietary and not a governmental sense, and is very inapt, indeed, to describe the District of Columbia." 225 U.S. at 415. The land on which Lorton is located lies, however, within the boundaries of Virginia, and not within the District of Columbia; and it was "acquired" by the federal government through purchase or condemnation, not through special cession by the State. *Johnson* is therefore inapposite here.

Petitioners also rely (Pet. 23-24) on *Cannon* v. *United States*, *supra*, and *United States* v. *Gibson*, 880 F.2d 795 (4th Cir. 1989). *Cannon*, however, held only that Lorton was not a "federal agency" for purposes of liability under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*—in part because, under the federal statutory scheme for local government of the District, the District and its employees have operational responsibility for the prison, and do not share the federal government's general sovereign immunity from tort liability. See 645 F.2d at 1133 n.15, 1135-1137. In *Gibson*, the court held that Lorton is not a "[f]ederal * * * facility" for purposes of 18 U.S.C. 1791, which bars the possession of contraband in federal prisons. 880 F.2d at 797. Both cases turn on the relationship between the "home rule" structure that Congress has chosen for the District and the operation of particular federal statutes; neither deals with the sort of fundamental, territorial jurisdictional issue addressed by 18 U.S.C. 7(3).[2] With respect to that issue petitioners point to no conflict among the courts of appeals, and suggest no persuasive reason for questioning the conclusion of the courts below.

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[2] Any conflict between this case and *Gibson* would, in any event, be a matter for internal resolution by the court of appeals. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

2. Petitioners argue (Pet. 28-50) that the district court was required to grant their motion for a mistrial because of Travis Cameron's testimony, on redirect examination, that the reason he said he wanted to kill petitioner Hazel was that Hazel had sexually assaulted him. But that remark was never admitted into evidence. To the contrary, the judge sustained petitioners' immediate objection, and promptly instructed the jury to disregard the question and answer because they had "nothing to do with this case." Pet. 31-32. Petitioners suggest no reason for abandoning in this case "the almost invariable assumption of the law that jurors follow their instructions." *Shannon* v. *United States*, 114 S. Ct. 2419, 2427 (1994) (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987)).

Moreover, as both courts below ultimately recognized (see Pet. App. 4a), the district court should not have excluded the question and answer in the first place. When the defense attempts to show that a witness is biased against the defendant, the government is generally entitled to elicit the witness's explanation of the reasons for his apparent bias, even if it refers to the defendant's other crimes. See *United States* v. *Kimbrough*, 528 F.2d 1242, 1248-1249 (7th Cir. 1976) (government witness permitted to refer to defendant's other crime to rebut contention that he was "out to get" the defendant). Because petitioners sought to establish Cameron's bias by eliciting Cameron's previous comment to petitioners' counsel that he would like to "[k]ill" Hazel, it was "entirely appropriate" (Pet. App. 5a) for the prosecutor to put that remark in context by asking Cameron to explain the source of his enmity.[3]

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[3] Petitioners' argument that evidence of the sexual assault on Cameron was not admissible under Federal Rule of Evidence

Finally, both the trial court and the court of appeals agreed that Cameron's passing reference to the prior sexual assault, immediately counterbalanced by the instruction to disregard it, caused "no prejudice" and was "undoubtedly harmless." Pet. App. 4a-5a. There is no reason to question that conclusion.

3. Petitioners contend (Pet. 50-65) that the district court should have granted their motion for a new trial based on newly discovered evidence. A defendant is entitled to a new trial on that basis only if he can show that the evidence is newly discovered, that it could not have been obtained earlier through due diligence, that it is material (not merely impeaching or cumulative), and that it would probably result in an acquittal on retrial. Pet. App. 6a; see also, *e.g.*, *United States* v. *Walker*, 25 F.3d 540, 548 (7th Cir.), cert. denied, 115 S. Ct. 531 (1994); *United States* v. *Braggs*, 23 F.3d 1047, 1050 (6th Cir.), cert. denied, 115 S. Ct. 274 (1994); *United States* v. *Reed*, 887 F.2d 1398, 1404 (11th Cir. 1989), cert. denied, 493 U.S. 1080 (1990); *United States* v. *Kelly*, 790 F.2d 130, 133 (D.C. Cir. 1986); *United States* v. *Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.), cert. denied, 113 S. Ct. 258 (1992). The court below concluded correctly that petitioners could not meet that test. Even assuming that the proffered evidence was new and material and should not have been discovered earlier, the court of appeals held that it amounted to no more than "additional

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404(b) is beside the point. Evidence that is admissible for one purpose may not be excluded entirely because it would be inadmissible if offered for some other purpose. *United States* v. *Abel*, 469 U.S. 45, 56 (1984). Cameron's testimony about Hazel's alleged sexual assault was offered to decribe the context of, or offer an explanation for, the witness's prior comment to petitioners' counsel, not to show motive, opportunity, intent, or any other attribute of the defendant under Rule 404(b).

impeachment" of the testimony of the government's witnesses. Pet. App. 7a. That fact-bound issue does not warrant further review.

Both courts below also held that petitioners were not entitled to a new trial because the new proceeding "would not probably produce a different result." Pet. App. 8a. Petitioners argue (Pet. 58-64) that in other circuits they could have obtained a new trial by showing only that a jury considering their new evidence "might have" acquitted them. Pet. 59. Even the test petitioners advocate, however, applies only if the trial court is "reasonably well satisfied that the testimony given by a material witness is false." *Id.* at 58-59 (citing *Larrison* v. *United States*, 24 F.2d 82 (7th Cir. 1928)). Petitioners offer no indication that either of the courts below believed that a material witness had testified falsely. Nor is there any indication that application of the "might have" standard would have assisted petitioners: both courts agreed that this "was not a close case." Pet. App. 8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1995